State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

School Administrative Unit 21	*	
Complainant	*	
v.	*	Case No. T-0257-9
Seacoast Education Association, NEA-NH	*	Decision No. 2005-143
Respondent	*	

APPEARANCES

Representing the Complainant: Robert A. Casassa, Esq., Casassa and Ryan, Hampton, NH

Representing the Respondent: Steven R. Sacks, Esq., NEA-NH, Concord, NH

BACKGROUND

The Seacoast Administrative Unit 21 School Boards, (hereinafter "District") filed an improper practice charge on June 14, 2005 alleging that the Seacoast Education Association/NEA-NH (hereinafter "the Association") violated RSA 273-A:5, I (f) by demanding arbitration of a grievance filed on behalf of an individual employed as a school nurse by the Hampton School District. The school nurse was not offered a contract for continued employment for the 2005-2006 school year. The District takes the position that her grievance, challenging her failure to be re-appointed, cannot be processed and is not a proper subject of arbitration because: (1) the position is not included in the parties' collective bargaining agreement (CBA) recognition clause; and (2) actions involving the failure to re-appoint to employment are specifically excluded from arbitration by the terms of the parties' CBA.

The Association's answer, filed on June 29, 2005 asserts that the issue is subject to arbitration. The Association references the long history of the parties bargaining over wages and benefits for school nurses as evidenced by the parties' CBA containing language that covers salary and benefits for the position. Further, the Association asserts that the bargaining unit includes the position of school nurse, notwithstanding the absence of the language "school nurse" in the recognition clause of the parties' CBA. The Association requests that the District's

unfair labor practice charge be denied, and that the school nurse's grievance be permitted to proceed to arbitration.

A pre-hearing conference was conducted on July 27, 2005. The parties agreed to hold in abeyance the Association's arbitration request until the PELRB issues its decision as to arbitrability. A subsequent evidentiary hearing was conducted before a hearing officer on August 4, 2005 at which time both parties were present and represented by legal counsel. They were given the opportunity to offer exhibits and present witnesses as well as to conduct cross-examination. The parties also submitted a set of agreed facts to which they stipulated could be made a part of the record. These agreed facts appear below in Finding of Fact #5. Each party's counsel made an opening presentation and after presentation of evidence, the record was kept open at the request of counsel to allow the submission of post-hearing legal memoranda in support of their respective positions. The hearing officer granted the request and originally scheduled submission for no later than September 16, 2005. The date for submission was later extended at the request of counsel to September 20, 2005. After receipt of the memoranda, the record was considered closed and the undersigned hearing officer considered the pleadings, exhibits and witness testimony, the credibility of all witnesses and weight assigned to all exhibits and finds as follows:

FINDINGS OF FACT

1. The Seacoast Administrative Unit 21 School Boards ("District") is a public employer within the meaning of RSA 273-A:1 X.

2. The Seacoast Education Association/NEA-NH (hereinafter "Association") is the duly certified exclusive bargaining representative for certain individuals employed by the District.

3. At times relevant to these proceedings, SAU #21 and the Association were parties to a collective bargaining agreement ("CBA") effective July 1, 2002 to June 30, 2005. (Joint Exhibit #1)

4. The parties' CBA contains a grievance procedure within ARTICLE III that defines, in relevant part, a grievance as meaning "a complaint by any employee covered under Article I, Recognition...." Joint Exhibit #3, p.3.

5. The parties, through counsel, stipulated to several facts prior to the presentation of evidence, and submitted the same for consideration in the instant case. They are as follows:

   a. Denise Gough was employed as a school nurse in the Hampton School District for 16 ½ years from January 9, 1989 to June 30, 2005.

b. By letter dated April 13, 2005, Superintendent Gaylord advised Ms. Gough that she would not be offered a contract for the 2005-06 school year.

c. On May 2, 2005, Ms. Gough, through her representative, Kevin Fleming, filed a grievance over her not being renominated to her school nurse position at Hampton Academy Junior High. She cited violations of Articles V and III-7.2 of the CBA between the Seacoast Education Association (SEA) and the Hampton School District ("the District"). Joint Exhibit #2.

d. On May 19, 2005, Steven R. Sacks, counsel for the SEA, wrote to the American Arbitration Association (AAA) to advance Ms. Gough's grievance to arbitration. School District, hereinafter "SD", Joint Exhibit #5.

e. On May 20, 2005, Attorney Robert Casassa, counsel for the Hampton School District, responded to the grievance. The District's position is that the grievance is not arbitrable. Joint Exhibit #3.

f. On May 26, 2005, Attorney Casassa wrote to the AAA stating that the District is unwilling to submit Ms. Gough's grievance to arbitration for the reasons set forth in his May 20, 2005 letter, (Joint Exhibit # 3), SD Exhibit # 7.

g. The SEA subsequently agreed to hold in abeyance the arbitration over this grievance, while the PELRB decided whether the present grievance is arbitrable.

h. The PELRB initially certified the Seacoast Education Association bargaining unit by certification order dated December 7, 1976. Joint Exhibit # 4.

i. Each of the CBA's negotiated by the parties from 1976 until the present contain a Recognition Clause at Article 1-1, which states as follows:

> "For purposes of collective negotiations, the Board recognizes the Seacoast Education Association as the exclusive representative of all professional employees of the Supervisory Union #21. Professional employees shall include any individual employed by the Supervisory Union #21, the qualifications for whose position are such as to require him to hold an appropriate credential issued by the State Board of Education under its regulations governing the certification of professional school personnel, EXCEPT that the term does not include superintendents, assistant superintendents, principals, assistant principals, directors, teacher consultants, business administrators, or persons employed by the State Board of Education or Department heads who teach three (3) periods or less per day for fifty (50) percent or less

time per week. The Association agrees to represent equally all such professional employees in the unit designated above without discrimination and without regard to membership in the Association."

j. No bargaining unit modification orders have been issued by the PELRB.

k. The New Hampshire Supreme Court has ruled that RSA 189:14-a is inapplicable to school nurses, so that school nurses cannot appeal a nonrenewal to the local school board. *Ferreira v. Bedford School District*, 133 NH 785 (1990).

6. James F. Gaylord is the Superintendent of the District and has been for approximately three years.

7. The job position of nurse is expressed within provisions of the parties CBA and referred to specifically in clauses granting job benefits, particularly Article 22-3 that provides, "All benefits of the contract will apply".

8. Superintendent Gaylord denies that he processed earlier claims brought to him by the Association's Grievance Chairman, Mr. Kevin Fleming, as grievances, but rather understood discussion about issues brought by Mr. Fleming to be merely open discussions irrespective of any grievance process.

9. Mr. Fleming testified that there had been a grievance made on behalf of Nurse Gillen, previously, that was processed involving the Hampton School District and overseen by a previous superintendent, Norman Katner.

10. Prior to Spring 2005, there had not been any challenge to the nurses' status as being employees represented by the Association.

11. On or about November 2004 and February 2005, Nurse Gough was the subject of action undertaken by the District in response to her performance, or lack thereof and on which Mr. Fleming and Mr. Gaylord conferred. Each of these men characterize these meetings differently with Mr. Fleming viewing them as part of the grievance process and Mr. Gaylord viewing them as part of an open meeting between them not linked to the grievance process within the CBA.

12. Superintendent Gaylord testified, relying on a letter from the New Hampshire Department of Education (District Exhibit #2C), that prior to July 1974 the Department of Education issued a certificate or "endorsement" to school nurses but that it did not do so after that time.

13. The rationale for the Department of Education suspending its issuance of certificates or endorsements "was that the Board of Nursing was responsible for licensing nurses, including school nurses." District Exhibit #2C.

14. That the function of credentialing school nurses was transferred to the Board of Nursing is further evidenced by Admin. R. ED 511.16 School Nurse, as adopted, effective 1982,1984,1990. (Association Exhibit #4)

15. The Department of Education retained, by administrative rule, a requirement to hold the position of school nurse: "to be certified as a school nurse, an individual shall hold a current license to practice as a registered, professional nurse in New Hampshire issued by the New Hampshire board of nurse education and nurse registration." Admin. R. Ed 511.16 School Nurse.

16. At least through 1992, the Department of Education was still issuing hard copies of Certificates to nurses. (Association Exhibit #5).

17. Ruth A. Xavier is a retired nurse who previously worked within the District during the period 1976-2001 and held a certificate from the Department of Education, at least through 1993. (Association Exhibit #5)

18. Nurse Xavier also was a member of the Association's negotiating team for two sequential CBA's effective for 1983-85 and 1985-87.

19. Ms. Xavier was present at these negotiations specifically to represent nurses and with the intent to increase their salary and other benefits.

20. On those occasions the District expressed no objection to her participation.

21. For every one of the years she was employed, the individual contract presented to her by the District to sign was entitled "Teacher Contract" and were the same as those individual contracts presented to teachers.

22. Nurse Gough possessed a valid nurse's license at the time of her non-renewal notification.

23. During the course of her employment, she received the benefits of the bargaining unit's CBA's, including express compensation for wages, longevity and reimbursement of graduate study.

24. Nurse Gough never applied to the Department of Education for a certificate.

25. The parties' effective CBA identifies, in Article 3-7.2, certain matters that shall not be considered as proper subjects for arbitration. Those matters thereby not subject to arbitration include "(e) a complaint of a nonconforming contract teacher which arises by reason of his/her not being re-employed...", and "(f) a complaint by any certificated personnel occasioned by appointment to or lack of appointment to, retention in or lack of retention in any position for which

continuing contract status is either not possible or not required." (Joint Exhibit #1, p.4)

26. Both parties were aware that nurses participated in negotiations for CBA's that provided mutually agreed upon benefits to nurses as well as teachers.

27. Management historically presented nurses with individual contracts to execute that were entitled "Teacher Contract".

28. The parties' effective CBA provides, in Article V, that "No teacher shall be disciplined unless a just cause appears." There is no specific reference to "nurse" in Article V nor is "discipline" defined within the CBA.

29. The parties have chosen to make express reference to individuals covered by the terms of their CBA (Joint Exhibit #1) by use of several different terms frequently within the document. These include the use of references that embrace beneficial or obligatory notions for these individuals labeled as: "staff members"; "teachers"; "nurses" (e.g. Joint Exhibit #1, p.19)

30. The parties' CBA provides that:

> " A 'Grievance' shall mean a complaint by any employee covered under Article I, Recognition, that there has been to him/her a personal loss, injury or inconvenience because of a violation, misinterpretation or inequitable application of any of the provisions of the Agreement governing employees." (Joint Exhibit #1, p.3).

31. The parties' CBA also provides that:

> "No matter shall be considered a proper subject for arbitration or be subject to the arbitration provision set forth herein, if it pertains to ... (e) a complaint of a noncontinuing contract teacher which arises by reason of his/her not being re-employed or (f) a complaint by any certificated personnel occasioned by appointment to or lack of appointment to, retention in or lack of retention in any position for which continuing contract status is either impossible or not required". (Joint Exhibit #1, p.4,Article 3-7.2).

32. The Association's complaint against the Superintendent by which it seeks arbitration also alleges a breach of Article V of the parties CBA. In part, that article states that, "No teacher shall be disciplined unless a just cause appears". (Joint Exhibit #2)

DECISION AND ORDER

JURISDICTION

The PELRB has exclusive original jurisdiction over the question of whether or not a party to a dispute is entitled to submit an issue to arbitration where the parties have not specifically granted that authority to an arbitrator. This is a threshold consideration often referred to as "determining the arbitrability" of an issue. In this matter, the parties have not expressly granted that authority to an arbitrator by the terms of their CBA or any other writing in evidence. (See Joint Exhibit #1, CBA, Article III – GRIEVANCE PROCEDURE). Without that specific reservation of authority to an arbitrator, the PELRB assumes jurisdiction to determine whether to refer the matter to arbitration. (See *Appeal of Hinsdale Federation of Teachers*, 138 NH 88, 90 (1993); *Appeal of AFSCME Local 3657 Londonderry Police Employees*, 141 N.H. 291 (1996); *Appeal of Belknap County Commissioners*, 146 N.H. 757,761 (2001) It may also find that a party's request for arbitration constitutes a wrongful demand to use that forum in breach of the parties' collective bargaining agreement and, thereby, constitutes the commission of an unfair labor practice. (RSA 273-A:5, I (h) and RSA 273-A:5,II (f);

DISCUSSION

The District, a public employer as defined in RSA 273-A:1-X, and the Association, the duly certified exclusive representative as provided for in RSA 273-A:8, have been parties to several collective bargaining agreements since at least 1976. The parties' relationship was governed by such a CBA, effective from July 1, 2002 through June 30, 2005, (See, Joint Exhibit #1) at the time the District undertook acts resulting in the non-renewal or termination of Denise Gough, who had been employed as a school nurse for approximately sixteen and one-half years. These acts included written notification to her advising that she would not be offered a contract for the school year 2005-2006 and her consequent termination.

The Association filed a timely notice with the District of its desire to file a grievance on her behalf and, later, to pursue arbitration of the District's action. The District alleges that their actions regarding the termination, or non-renewal, of Nurse Gough is not subject to arbitration because she is not a member of the bargaining unit and even if she were, the actions undertaken are not subject to arbitration pursuant to the parties' CBA.

Under the terms of the parties CBA, contract interpretation of the substantive rights embodied within a CBA is assigned to an arbitrator. However, in order to properly decide these two issues, it is necessary to undertake some level of interpretation of the terms and conditions within the CBA as applied by the parties to determine whether the instant dispute presents a "colorable issue of contract interpretation". *Appeal of Westmoreland School Board*, 132 N. H. 103, 109; cited in Appeal of AFSCME 3567, *Londonderry Police Employees*, 141 N. H. 291,295.

As to the first issue of whether Nurse Gough is a member of the bargaining unit and therefore eligible to exercise grievance rights embodied in the CBA, I believe that based upon what the parties have expressed in their CBA and what they have not expressed in their CBA as well as their conduct and their testimony at hearing a colorable issue of contract interpretation exists.

In order for Nurse Gough to be able to utilize the grievance procedure of the parties' CBA, she had to be "covered" by the Recognition Clause of the 2001-2005 CBA which was, in all relevant aspects, the same as that which had been incorporated into the parties' several previous CBA's dating back to the initial certification of the bargaining unit on December 7, 1976. (Joint Exhibit #4). No modified certificate indicating any change in composition of the unit has been filed with the PELRB since then. In relevant part, the recognition clause defines those who are covered and therefore may avail themselves of the benefits of a grievance procedure as,

> "any individual employed by the School Administrative Unit No. 21, the qualifications for whose position are such as to require him/her to hold an appropriate credential issued by the State Board of Education under its regulations governing the certification of professional school personnel,..." (Joint Exhibit #1, p.1).

Neither the position of "teacher" nor "school nurse" is specifically expressed in this clause. The applicability of this clause to the position of "school nurse" is called into question by evidence advanced by both parties establishing that nurses were initially credentialed as "school nurses" through the Board of Education, but that in or about 1982 the Board of Education yielded this authority to the Board of Nursing. Thereafter, a nurse still had to have a professional credential to be qualified as a school nurse as required by the Department of Education's (DOE) administrative rules, but the credential was, instead, to be issued by the Board of Nursing. (Admin. R. Ed 511.16 School Nurse). To add further confusion to the source of credentialing, there was credible documentation offered by the Association, that the DOE was still issuing certificates to school nurses effective through 1993 (Association Exhibit #5) while the District offered evidence that the DOE did not issue certificates or so-called "endorsements" to school nurses after July 1974. (District Exhibit 2C).

I believe the requirement to be a certified professional nurse remained if an employee were to act as a school nurse within the District and the function of issuing the proper certificate, or credential, was transferred by the action of a third party, the State of New Hampshire. I further believe that it was the parties' concern and therefore may have been their intention that school nurses be professionally credentialed before interacting with the school population rather than that a school nurse possess a credential issued only by the DOE before performing their service within the school population. The latter interpretation would present an impossibility of performance for at least twelve years prior to the District's action leading to Nurse Gough's termination, or non-renewal. It appears from the testimony of Superintendent Gaylord that, until he made a specific inquiry in 2004, he was not aware that the Board of Nursing was now the credentialing body for professional nurses who would perform as school nurses. It would be exceptional for an exclusive bargaining representative not to correct language necessary to

accommodate a third party's action that could invalidate a provision of its CBA, if known. I choose to believe that it, too, was unaware of the State of New Hampshire's action shifting responsibility when the parties continued to negotiate a sequence of CBA's. As neither was apparently aware of the administrative transfer of this responsibility I believe mutual mistake contributed to the ambiguity of that clause when read in the context of the parties' complete agreement as expressed in their CBA. Credible testimony was presented at hearing to establish that Nurse Gough possessed a valid license issued by the Board of Nursing in 2005, including the time of her termination or non-renewal.

Furthermore, considering the context of the parties' entire contract, I am more convinced that reasonable minds could differ as to the meaning intended by the parties because, while much of the language embraces beneficial and obligatory notions for individuals labeled as "staff member", "teacher", "individuals" and "employees", there are also specific and meaningful references to "nurses" involving the provision of rights and assignment of obligations. (*e.g.* Joint Exhibit #1, p.19). Additionally, both parties presented evidence indicating that both teachers and school nurses were presented with an annual "individual contract" entitled "Teacher Contract". The one exception appears to have been an inconsequential duplicative presentation of a document entitled "Nurse Contract" to Nurse Gough, after she had signed the originally presented "Teacher Contract" in all years, including the last for which she was employed. If identical individual contracts were presented over the years to teachers and nurses alike for reason's of "administrative convenience", I find that rationale to supply no legal clarification to the ambiguity presented by the overall loose drafting of the parties' CBA for which both must assume responsibility. All of this leads me to conclude on the threshold issue that the recognition clause is ambiguous and therefore is subject to substantive contract interpretation by an arbitrator.

Having determined the threshold issue in that manner, I consider the second issue raised by the parties' present dispute. This issue involves the application of the parties' grievance clause (Joint Exhibit #1 – Article III) and evaluation clause, (*Id.* Article V) as is referenced in the Association's "Statement of Grievance" (Joint Exhibit #2). Here a determination must first be made as to whether the attempted grievance of Nurse Gough is of the type that is within the contemplation of the parties to require processing through the grievance process contained within their CBA. In order for a complaint to be considered under the provisions of the parties' CBA, it first must qualify under the following definition:

> " a complaint by any employee covered under Article I, Recognition, that there has been to him/her a personal loss, injury or inconvenience because of a violation, misinterpretation or inequitable application of any of the provisions of the Agreement governing employees." (Joint Exhibit #1, p.3).

Without other qualifications, Nurse Gough's non-renewal or termination from her employment would ordinarily be deemed a proper subject of arbitration through the application of the parties' grievance clause. Concluding that her complaint meets the criteria required of a grievance, the CBA must then be reviewed for the existence of any exclusions to see if employees loose the right to challenge the type of decision undertaken by Superintendent Gaylord. Article 3-7.2 of the parties' CBA states:

> "No matter shall be considered a proper subject for arbitration or be subject to the arbitration provision set forth herein, if it pertains to ... (e) a complaint of a noncontinuing contract teacher which arises by reason of his/her not being re-employed or (f) a complaint by any certificated personnel occasioned by appointment to or lack of appointment to, retention in or lack of retention in any position for which continuing contract status is either impossible or not required".

Addressing first the latter exclusion contained in sub-section "(f)", there is insufficient evidence to establish that the continuing contract status of Nurse Gough was "impossible" or "not required". I do find that the parties may have contemplated two types of complainants or, more relevantly, grievants because sub-section (f) addresses a complaint by "any certificated personnel". Sub-section (e) addresses a complaint of "a noncontinuing contract teacher". On the other hand, the parties may well have contemplated that these two terms referred to a class of employee that is one and the same. I consider this, again in the context of the entire document, an ambiguity that calls for substantive interpretation of the CBA by an arbitrator or otherwise immediately mutually clarified by the parties.

The remaining basis within this provision upon which her grievance might be excluded would require classifying her as a "noncontinuing contract teacher". Under the express terms of the parties' CBA the characterization of "noncontinuing" cannot attach to her because she has been employed for over sixteen years and "continuing" status attaches in the fourth year of employment. (See Joint Exhibit #1, p.1, defining "Continuing Contract Teacher"). The determination of whether, under the terms of the parties' CBA, the characterization of "continuing" or, under other circumstances, "noncontinuing" status inures to nurses as one of those benefits intended by the parties in Article 22-3 must be determined through substantive contract interpretation.

The possible inclusion of such others could be found within still another ambiguity created by language agreed to by the parties and incorporated into their CBA. In Article 22 of their CBA, the parties' state that "All benefits under the contract will apply." This statement could reasonably be read to extend all negotiated benefits found within the CBA to school nurses if it is read in the context of Article 22-3. Without qualifying language, "all" could reasonably be interpreted as "each and every." Could a reasonable interpretation of that statement include a determination that that language represents a drafting device to incorporate terms appearing throughout the agreement by reference? I believe it could and here, too, a substantive interpretation based upon sufficient evidence would be called for to determine what is intended by the parties.

The reason that this statement requires scrutiny relates to that portion of the complaint that alleges that the superintendent's action can be grieved as a violation of Article V of the CBA. It also deserves scrutiny because it calls into question a due process benefit and one that I believe would require substantive interpretation of the parties' intent. This article provides an express benefit. It states, "No teacher shall be disciplined unless a just cause appears." The parties have not defined "discipline" within their CBA or presented any other evidence that would express what actions are to be considered "discipline." I believe that reasonable minds could differ as to

whether the parties' CBA expresses an intent to include Nurse Gough's non-renewal or termination as a form of discipline. The parties' intent on this point is not clear from the language of the CBA or evidence offered at hearing. Did the parties intend to require "just cause" to exist before Nurse Gough could be disciplined? Is an evaluation of Nurse Gough required and a finding of just cause necessary for non-renewal or termination? I have already expressed, in the paragraphs immediately above, my belief that a substantive interpretation is required to determine whether the statement "[a]ll benefits under the contract will apply", puts nurses in the shoes of "teachers" for purposes of determining all benefits, including the protections of "continuing contract" status. I add to that belief the need for substantive contract interpretation to determine whether the parties intended a "just cause" standard prior to ciscipline to also inure to school nurses.

The need for substantive contract interpretation arises from the ambiguities created by the language mutually agreed to by the parties for inclusion in their CBA. These ambiguities do not arise from mere reference to "nurses" within the text of the CBA, but negotiated terms including specific reference to some benefits and general reference to others. Other ambiguities arise from inconsistent phrases within the CBA that describe what category of individuals within the bargaining unit are being referred to by the parties. The testimony of the parties at hearing conflicted when attempts were made to present the historical treatment of school nurses and the nature of previous complaints brought to the District's attention by the Association. The parties to this CBA have created a document that lacks clarity when its terms are applied to the present set of circumstances. What may be interpreted by one party as a clear exclusion contained in a particular provision creates a colorable issue of contract interpretation when read in the context of the entire CBA. What may be interpreted by another party as an obvious entitlement to certain benefits also creates a colorable issue of contract interpretation when that entitlement is conditioned upon temporal procedures employed by an entity not a party to the agreement.

After encountering what appears to this hearing officer as significant and relevant ambiguities as well as what could have been a mutual mistake in fact relating to processes employed by the State of New Hampshire, I cannot determine with the requisite "positive assurance" that the parties' CBA is not susceptible of an interpretation that covers this dispute between the District and the Association. I cannot determine with the requisite "positive assurance" that the exclusionary language the parties have used in Article 3-7.2 excludes a school nurse of sixteen years' service from grieving her non-renewal or termination to arbitration. Nor have the parties sufficiently distinguished the evaluative procedural rights including the attachment of a specific "just cause" standard to a disciplinary action as appears in Article V with a general exclusion in Article III sufficient to meet the "positive assurance" test.

The presumption of arbitrability remains under the existing language of the parties' CBA and the circumstances presented by evidence. The District's unfair labor practice complaint is dismissed. The parties are commended for their cooperation in staying any arbitration proceedings pending this decision. The substantive interpretations necessary to a resolution of this dispute must be resolved by an arbitrator. The parties shall therefore proceed to arbitration forthwith.

So ordered.

Signed this 15th day of November, 2005.

Donald E. Mitchell, Esq.
Hearing Officer

Distribution:
Steven R. Sacks, Esq.
Robert Casassa, Esq.